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Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Appellant,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation, et al.,
Appellees.

BRIEF OF APPELLEES

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ECLIPSE COMPOSITION COMPANY, 243 W. LARNED ST., DETROIT

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Appellees.

BRIEF OF APPELLEES

I.

REPORT OF OPINIONS OF THE STATE COURT

This is an appeal from an order entered by the Supreme Court of the state of Michigan on June 30, 1941, denying to Appellant a writ of mandamus, which order was based upon opinions reported in 298 Michigan 314-330.

II.

GROUNDS OF JURISDICTION

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked by Appellant are stated on pages 2 and 3 of its brief and in the Jurisdic-

tional Statement previously filed and printed. Appellant claims in this appeal that as construed by the Supreme Court of Michigan certain 1937 and 1939 Michigan statutes impair the obligation of Appellant's contract right as the holder of special assessment bonds to an additional assessment and deprive Appellant of its property without due process of law. We agree that these constitutional questions were properly raised in the court below (R. 17-18) and were decided in favor of the validity of the statutes by the Supreme Court of Michigan (R. 22, 25).

Appellees did not file statements opposing the jurisdiction of this Court, having been of the opinion that the federal questions involved on this appeal were of a substantial nature.

The court below did not pass upon the possible defense that Appellant would not have had the right to reassess even if no consideration were given to the 1937 and 1939 legislation under attack on this appeal. If the Supreme Court of Michigan had decided that no right to a reassessment existed even if the 1937 and 1939 statutes were disregarded, then there would have been no federal question from which the plaintiff could have appealed to this Court because the judgment below would have had a non-federal ground adequate to support it. The Supreme Court of Michigan did not, however, decide this non-federal question, but based its decision upon the provisions of those statutes which are attacked by the Appellant as invalid under the Constitution of the United States.

It would seem, therefore, that this case is within the settled rule of this Court that where the state court has not passed upon a possible ground of defense which ap-

pears to involve no federal question this Court will decide the substantial federal questions and, if it reverses the state court on those questions, will not give final judgment but will remand to the state court to decide the non-federal question.

Indiana Ex Rel. Anderson vs. Brand, 303 U. S. 95;
International Steel Company vs. National Surety Company, 297 U. S. 657.

We are, therefore, of the opinion that this Court has jurisdiction to decide the federal questions raised on this appeal. If these questions are decided in favor of Appellants this Court should not give final judgment but should remand the case to the Supreme Court of Michigan to decide the non-federal question as to whether any right of reassessment exists apart from the unconstitutional provisions of the 1937 and 1939 statutes. If the federal questions are decided in favor of Appellees this Court will, of course, give final judgment of affirmance.

III.
STATEMENT OF CASE

We accept the statement of the case set forth in pages 4 to 10 of the brief for Appellant except that the Attorney General of Michigan wishes to add the following matters which he considers material:

This case was decided below upon the pleadings, no evidence having been offered by any of the parties.

It is alleged in the answer of the Attorney General of Michigan (R. 16) that the successful bidder at the State Land Office Board sale had not yet executed the contract for the purchase of the lots and that the time for the execution of the land contract has been from time to time extended, the final agreement between the bidder and the State Land Office Board being that said contract should not be signed until the Supreme Court of Michigan had decided this case. The Attorney General also alleged that the successful bidder takes the position and so informed the State Land Office Board that it will not execute the said land contract but will relinquish its rights under its bid and application in the event that the City of Birmingham reassessed the paving tax upon the lots in question.

The Attorney General further alleged that he had been informed and believed that the members of the State Land Office Board apprehended that if the successful bidder did relinquish its rights that other purchasers of lots on land contract will rescind their agreements and title to the property will again become vested in the state of Michigan (R. 16).

These allegations of the answer of the Attorney General of Michigan were admitted by the appellant in paragraph 3 of its reply (R. 17-18), but it denied that the circumstances alleged by the Attorney General constituted a defense to the Appellant's petition for mandamus (R. 17). Appellant also pointed out that the purchaser had not yet surrendered its rights nor had the State Land Office Board yet released it from its obligations as purchaser (R. 17, 18).

IV.
ARGUMENT

SUMMARY OF ARGUMENT

The argument of Appellees in support of the judgment of the Supreme Court of Michigan may be thus summarized:

1: The legislation in question was passed in the exercise of that "residuum of state power" which is read into all contracts "as a postulate of the legal order". (Quotations are from opinion of Hughes, C. J., in *Home Building & Loan Ass'n. v. Blaisdell*, 290 U. S. 398, at 435).

2: The changes made in the tax laws of the state of Michigan by the statutes of 1937 and 1939 affect only the remedy for the collection of plaintiff's bonds and do not impair their obligation.

(a) The amendments to the General Tax Law changed the time and manner of acquisition of absolute title by the state of Michigan to lands sold for delinquent taxes but did not substantially change the nature and legal effect of the state's title when acquired.

(b) The so-called Scavenger Act (Act 155 of the Public Acts of Michigan of 1937, as amended by Acts 29, 244 and 329 of the Public Acts of 1939) changed the method of disposition by the state of tax lands to which it had acquired absolute title, but did not prejudice Appellant's

contract rights for the reasons: (1) that the state of Michigan has always had the right to dispose of its absolute property in such manner and upon such terms as the legislature might provide, (2) that the only Michigan decision lending any support whatever to Appellant's contention that it has a vested right under the old law is *Case v. City of Saginaw*, 196 Mich. 687, which was decided by an equally divided court, has not been followed, and is readily distinguishable from the present case, and (3) that if the old law had been followed instead of the new the Appellant would have been in no better position than it is now.

3: The Michigan statutes should not be declared unconstitutional upon the showing made by Appellant in this case because the effect upon it of the decision of the Supreme Court of Michigan is purely speculative since it is doubtful whether the state could dispose of these lots if the purchaser has to take them subject to the burdensome reassessments and they are admittedly not subject to reassessment while owned by the state.

4: Appellant's right to reassessment is not clear in any event under the wording of the village and city charters.

POINT I.

THE LEGISLATION IN QUESTION IS IN THE EXERCISE BY THE STATE OF ITS RESERVED SOVEREIGN POWER WHICH IS READ INTO ALL CONTRACTS

This Court has on many occasions recognized that Section 10 of Article I of the Constitution of the United States does not prevent the enactment by the states of legislation appropriate to safeguard the vital interests of their people. Perhaps the most effective statement of this is that of Chief Justice Hughes in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, at 434-5:

> "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

The law of Michigan governing the sale, redemption and conveyance of delinquent tax lands in effect at the time Appellant's bonds were issued in 1928 is found in

Section 3451 and following of the Compiled Laws of 1929, being Sections 60 and following of the so-called General Property Tax Law, Act No. 206 of the Public Acts of 1893 as from time to time amended. These sections are summarized under Point II of this brief (*infra* pp. 16-21).

The legislation which Appellant claims to be unconstitutional as construed by the Supreme Court of Michigan in this case consists of certain 1937 and 1939 amendments to the General Property Tax Law embodied in Act No. 114 of Public Acts of 1937 and Act No. 282 of Public Acts of 1939 and also new legislation embodied in Act No. 155 of Public Acts of 1937 as amended by Act Nos. 29, 244 and 329 of the Public Acts of 1939 providing for a new procedure for the sale of delinquent tax lands, title to which has become absolute in the state of Michigan. Act No. 155 of the Public Acts of 1937 as amended is popularly known as the "Scavenger Act" and is sometimes referred to by that name in this brief. These 1937 and 1939 statutes are considered in detail under Point II of this brief (*infra*, pp. 24-42).

The 1937 and 1939 amendments to the General Property Tax Law and the Scavenger Act must be construed together because they are each an integral part of the plan whereby the legislature attempted to deal with the desperate problem of delinquent taxes which confronted it in 1937. The legislative background and history of these statutes was graphically described by Mr. Justice McAllister in *Baker v. State Land Office Board*, 294 Mich. 587 at 592-594:

> "Between the years 1920 and 1930 speculative activities in real estate in the State, unrestrained

by normal caution and on a scale unparalleled, had resulted in platting of subdivisions with building lots sold at highly inflated prices. The same exaggeration seeped into farm lands and business properties in cities. During this period municipalities and their officials encouraged the speculative movement by approval, in undeveloped areas, of widespread improvements, including sewer extensions, sidewalks, and pavements. The entire movement was pervaded by an enthusiasm uncolored by moderation. But all of these plans and hopes collapsed under the pitiless and inexorable advance of economic depression, of which this court has on several occasions taken judicial notice. *Schnitz v. Grand River Avenue Development Co.*, 271 Mich. 253; *Pesciarelli v. Trestain*, 288 Mich. 89. Vestiges of these shattered dreams of wealth survive in spectral outlines of cities now crumbling to ruin in remote country fields, and the omniscient eye of retrospection finds it is easy to survey the past and call it unwise.

"The result of this activity was that taxes on excessively high assessments became delinquent and accumulated in amount until they greatly exceeded the assessed valuation. For approximately six years subsequent to 1932, no tax sales were held; moratorium statutes were passed by the legislature, embodying waiver of interest and penalty charges, and providing for payment of taxes in instalments covering a 10-year period; but such efforts to effect payment were in vain, and the unpaid taxes accumulated until in some counties they exceeded five times the amount of the assessed valuation of the property. Planning commissions, which occupied themselves with a possible solution of the problem, were appointed by the governor, and concluded that the various plans to remedy the situation had failed to stop the abandonment of tax-delinquent land; and legislative committees made exhaustive studies in an effort to devise means of overcoming the rapidly growing peril which was assuming catastrophic

form. The result was the enactment of Act No. 155, Pub. Acts 1937, and the amendment of the general property tax law by Acts Nos. 114 and 325, Pub. Acts 1937."

In *Baker v. State Land Office Board, supra,* the constitutionality of the 1937 and 1939 amendments to the General Property Tax Law and of the Scavenger Act was upheld against attack on the grounds, among others, that these statutes would impair the obligation of the contracts of special assessment bondholders and would deprive such bondholders of their property without due process of law contrary to the applicable provisions of the constitutions of the state of Michigan and of the United States. The Supreme Court of Michigan held that the statutes in question did not contravene the contract or due process clauses of the state and federal constitutions because: (1) laws of retroactive character affecting tax liens which attached prior to their enactment are not unconstitutional nor do statutes affecting such liens and shortening the time previously fixed for sale or redemption impair contract obligations or vested rights but only affect the remedy for the delinquency of the taxpayer (*Baker v. State Land Office Board, supra,* at 599) and (2) purchasers of special assessment bonds "can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced" (*Baker v. State Land Office Board, supra,* at 599).

Under Point II of our argument (*infra,* pp. 16-42) we have examined in detail the changes effected by the amendments to the General Property Tax Law and by the Scavenger Act and have shown that their effects upon Appellant are no different than those considered by the Supreme

Court of Michigan in the *Baker* case. The reasoning of the Supreme Court of Michigan in the *Baker* case upholding their constitutionality is equally applicable to this case.

But it is not essential to our case that this court adopt the reasoning of the Supreme Court of Michigan. Recent decisions of this Court itself clearly sustain the legislation. Under these decisions the reserved police powers of the states are not limited to matters of health, morals, and safety but extend to economic needs as well, and all contracts are subject to these paramount powers.

Veix v. Sixth Ward Building & Loan Ass'n. 310 U. S. 32.
Home Building & Loan Ass'n. v. Blaisdell, 290 U. S. 398, *supra.*

In *Veix v. Sixth Ward Bldg. & Loan Assn., supra,* this Court held that the legislature of New Jersey could change withdrawal rights of members of building and loan associations without impairing their contracts because the legislation in question "was passed in the public interest to protect the activities of the associations for the economic welfare of the State" (310 U. S. 32, at 37).

Such changes did not impair the obligation of contracts "because the obligation of the Association to respond to the application for withdrawal was subject to the paramount police power" (310 U. S. 32, at 38). The authority retained by the states over contracts "is not limited to health, morals and safety. It extends to economic needs as well" (310 U. S. 32, at 38-9).

The fact that the legislation was permanent in character and not temporary was not considered significant in determining its status under the contract clause.

"If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue. • • • Such legislation may be classed as emergency in one sense but it need not be temporary" (310 U. S. 32, at 39-40).

We submit that under this Court's decision in *Veix v. Sixth Ward Bldg. & Loan Assn., supra*, the state of Michigan clearly had the power to make the reasonable and appropriate changes in the tax laws made by the legislature in 1937 and 1939 for the general economic welfare of the state regardless of the effect such legislation may have had on rights of special assessment bondholders.

Appellant argues in its brief (pp. 30-33) to the effect that the legislation in question was an attempt by the Michigan legislature to grant special favors to former owners of the property to the prejudice of bondholders. A similar argument was advanced in *Baker v. State Land Office Board*, 294 Mich. 587, and was convincingly disposed of by the Michigan Supreme Court in the following language:

> "That the statute in question is a mere subterfuge to cancel taxes and assessments, and to enable owners to escape their obligations to the governmental taxing authorities, is next advanced as an argument by petitioner. It is claimed that the act arbitrarily discriminates between rights and privileges of former owners, rights of municipalities, and strangers to the title, who bid at such sales. If

the former owner matches the bid of another, he is awarded the right of purchase. The State receives as much from one as it would from the other. It might well be the opinion of the legislative body that the former owner, once he was relieved of the weight of accumulated obligation, had a greater interest in maintaining the land as a taxpaying property than an outsider. Furthermore, there would seem to be no illegal consideration in granting municipalities a year's delay in order that they might acquire properties incumbered by taxes owed to them. The superiority of their interest and the public interest warrants such consideration; and to all of such contentions, it might well be answered that the primary and inducing purpose of the legislation was to secure a portion of the unpaid taxes, rather than nothing, and to restore lands to a taxpaying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them. In accordance with the foregoing, it is our determination that there has been no showing of unconstitutional discrimination or classification in the provisions of Act No. 155, Pub. Acts 1937; that Act No. 206, Pub. Acts 1893, as amended by Act No. 114, Pub. Acts 1937, does not contravene either the State or Federal Constitution as an *ex post facto* law, or impair the obligations of contract; and that the amending statutes, Act No. 244, Pub. Acts 1939, Act No. 325, Pub. Acts 1937, and Act No. 329, Pub. Acts 1939, are not invalid for the reasons as set forth and contended by petitioner'' (pp. 605-6).

Appellant places great reliance upon the decision of this Court in *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 in which an Arkansas statute was held invalid as impairing the obligation of bondholders' contract. The legislation in the *Worthen* case is readily distinguishable from the Michigan legislation involved here. The bonds

involved in that case were issued under special statutes "well planned to make these benefit assessments an acceptable security" (295 U. S. 56, at 57). The statutes declared invalid were amendments which changed the whole plan to enforce payments of assessments, making the enforcement much more lengthy and burdensome. In the language of Mr. Justice Cardozo:

> "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected" (295 U. S. 56, at 60).

The Arkansas legislation clearly did not respect these bounds of moderation or reason but were enacted in a spirit of oppression. In the language of Mr. Justice Cardozo:

> "A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor" (295 U. S. 56, at 60).

In contrast to the Arkansas legislation held invalid in the *Worthen* case, the Michigan statutes here attacked were enacted to meet a state-wide situation which threatened to paralyze the processes of government.

In the language of the Supreme Court of Michigan:

> "The primary and inducing purpose of the legislation was to secure a portion of the unpaid taxes,

rather than nothing, and to restore lands to a taxpaying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them" (*Baker v. State Land Office Board*, 294 Mich. 587 at 606).

The Michigan legislature, therefore, acted not in a "spirit of oppression" but rather with an enlightened view of the public welfare of the state. Its purpose could not have been accomplished if state lands could only be sold subject to the burden of reassessments for past improvements for which the original excessive assessments had been the very cause of the tax delinquencies. The state clearly had the power to deal with the situation in the way it did. The language of Mr. Justice Chandler in the court below can scarcely be improved upon as a statement of our position:

> "The clear import of the language of the foregoing amendatory enactments, and the obvious intent and purpose of the legislature to relieve owners from the weight of accumulated obligation, *James A. Welch Co., Inc. v. State Land Office Board*, 295 Mich. 85, must lead one to the conclusion that when title to the lots here in question became absolute in the state of Michigan upon expiration of the period of redemption provided by the tax law free of all taxes and other liens and incumbrances of whatever kind or nature, and future and deficiency as well as past assessments and taxes were cancelled. To hold otherwise would defeat the purpose of this remedial legislation by a narrow and unwarranted construction, and would once again give rise to the vicious circle of assessment based upon inflated valuation; refusal or inability of the owner to pay; followed by a sale of the premises pursuant to the state's sovereign power of enforcing the collection of taxes" (R. 24).

POINT II.

THE CHANGES MADE IN THE MICHIGAN TAX LAWS BY THE STATUTES OF 1937 AND 1939 DO NOT IMPAIR THE CONTRACT RIGHTS OF PLAINTIFF

A. The Relevant Provisions of the Michigan Tax Laws in Effect When Appellant's Bonds Were Issued.

Under the charter of the village of Birmingham delinquent special assessments, along with delinquent village taxes, were returned to the county treasurer for collection under the General Property Tax Law (R. 5). Thereafter the General Property Tax Law relative to the collection of such special assessments and the sale and redemption of property for the non-payment thereof were applicable (1 Compiled Laws 1929, Sec. 3500-3501; Appellant's Brief, p. 21).

The applicable provisions of the General Property Tax Law in effect when Appellant's bonds were issued (Act No. 206 of the Public Acts of 1893, as amended; 1 Compiled Laws 1929, Sec. 3389-3551 incl.) may be summarized as follows:

1. Section 57 (1 Compiled Laws 1929, Sec. 3448) required the county treasurer to forward to the Auditor-General a corrected transcript of all taxes on land returned as tax delinquent to his office, such transcript to be furnished by the first day of May after the return of the delinquent taxes to the county treasurer.

2. Sections 60 to 77 inclusive (1 Compiled Laws 1929, Sec. 3451 to 3470 incl.) provided the procedure whereby

all lands which had been returned delinquent to the Auditor-General and upon which any taxes were unpaid for the period of one year or more were subject to disposition, sale and redemption for the enforcement and collection of such tax liens. It is significant that Section 60 (1 Compiled Laws 1929, Sec. 3451) contained this important sentence:

> "In the disposition and sale of such delinquent tax lands the people of the state of Michigan shall be deemed to have a valid lien upon such lands, with all the rights to enforce the same as a preferred or first (1st) claim upon such lands, and the rights and choses to enforce such lien shall be held and construed by all the courts of this state as the prima facie rights of the state, and shall not be set aside or annulled except in the manner and for the causes herein specified."

The quoted sentence granting the state of Michigan a preferred first lien upon such lands has been embodied in the General Property Tax Law ever since its enactment in 1893 and, of course, any purchaser of special assessment bonds is charged with knowledge thereof.

(a) The procedure for enforcing this first lien is initiated by petition filed by the Auditor-General in the office of the county clerk in each county in which lands are to be sold at the annual tax sale, praying for a decree in favor of the state of Michigan against the lands described in the lists or schedules attached to the petition and praying further that in default thereof such lands be sold (1 Compiled Laws 1929, Sec. 3452). A statutory form of notice is sent to the taxpayer by the county treasurer and a statutory form of order is thereafter to be entered by the circuit judge setting the date for hearing the Auditor-General's petition and

providing for the sale of all lands described in the petition for which a decree of sale shall be made, such sale to be held on the first Tuesday in May thereafter or on the day or days subsequent thereto as may be necessary to complete the sale of all such lands (1 Compiled Laws 1929, Sec. 3453-3454). The petition and order must be published and such publication is made equivalent to personal service of notice on all persons interested in the lands specified in the petition and gives the court jurisdiction to hear the petition, determine the questions arising thereon and to decree a sale of such lands for the payment of all taxes, interest and charges thereon (1 Compiled Laws 1929, Sec. 3458). After the hearing a decree is entered in statutory form (1 Compiled Laws, 1929, Sec. 3459).

(b) On the first Tuesday of May of each year the county treasurer is required to commence the sale of lands mentioned in the decree (1 Compiled Laws 1929, Sec. 3462). Each parcel described in the decree is separately offered for sale and if any parcel cannot be sold for the amount of the delinquent taxes, interest and charges the county treasurer "shall bid off the same in the name of the state, for the state, county and township, in proportion to the taxes, interest and charges due each." It is further provided that "all lands bid off in the name of the state shall continue liable to be taxed in the same manner as if they were not the property of the state, except as hereinafter provided" (1 Compiled Laws 1929, Sec. 3462).

(c) Section 74 (1 Compiled Laws 1929, Sec. 3467) granted to any person owning any of the

lands so sold or any interest therein the right to redeem any parcel at any time before the first Tuesday in May in the year following the sale.

3. Section 78 (1 Compiled Laws 1929, Sec. 3471) provided that all land bid off to the state for taxes which had not been redeemed or otherwise disposed of should continue to be offered for sale each year by the county treasurer at the regular annual tax sale.

4. Section 84 (1 Compiled Laws 1929, Sec. 3477) gave any person the right to purchase any state tax lands or any state bids at any time except during the time of the annual tax sale and 15 days prior thereto by paying the amount of the state bid and interest and by paying any other taxes which had been returned delinquent to the Auditor-General and remained a lien on the land, provided that during the one year redemption period any state bid could be purchased without payment of the taxes of subsequent years if the land was not also held by the state as state tax land.

5. Section 85 (1 Compiled Laws 1929, Sec. 3478) provided that no sale of state tax lands or state bids should prejudice the right to enforce the collection of any tax for subsequent years for which the Auditor-General must continue to offer the lands for sale in regular succession at the next ensuing annual tax sales.

6. Section 127 (1 Compiled Laws 1929, Sec. 3520) among other things provided with respect to lands delinquent for taxes for any five years which had been sold and bid off to the state for any one of those years and not redeemed,

purchased or the subject of pending litigation, that "title to the state shall be deemed absolute in and to said lands", and such lands should thereafter be subject to disposition as therein provided after examination by the Auditor-General and the director of conservation to determine what lands came within the provisions of said Section 127. Within 90 days after such determination all lands subject to Section 127 should be deeded by the Auditor-General to the state of Michigan, with certain exceptions not important here.

7. Section 130 (1 Compiled Laws 1929, Sec. 3524) provided, and still provides, that all taxes charged against such lands in the office of the Auditor-General at the time they are deeded by him to the state shall be cancelled, and that the "state, county and township respectively shall bear the share of the loss on such taxes that properly belongs to each." The assessing officers are directed to remove and cancel such lands from the assessment rolls.

8. Section 131 (1 Compiled Laws 1929, Sec. 3527) provided for the disposition of such lands, with certain reservations, by the director of conservation as state tax homestead lands. One who applied for homestead entry was entitled to purchase for ten cents an acre. If no homestead application was made an appraisal had to be made and the director of conservation could sell and convey such lands at not less than the appraised valuation. The purchase money was credited to the state, county and township in proportion to the amounts due each for taxes on the land at the time it was deeded to the state.

Summary of Relevant Provisions of General Property Tax Law in Effect When Appellant's Bonds Were Issued.

The foregoing sections of the General Property Tax Law may be further summarized as follows (References are to sections of the General Property Tax Law):

The people of the state of Michigan had a preferred first lien upon all delinquent tax lands (Sec. 60). Lands returned delinquent to the county treasurer and reported by him to the Auditor-General were to be offered for sale by the county treasurer in May of each year upon petition of the Auditor-General and decree of the circuit court. (Secs. 61-71 inclusive). Lands not sold to private bidders were to be bid off to the state but continued to be taxed in the same manner as if they were not the property of the state (Sec. 70), and unless redeemed continued to be offered at succeeding annual tax sales (Sec. 78). A one year redemption period was provided for (Sec. 74), but anyone, including former owners, could thereafter repurchase from the state (Sec. 84) until the lands had been delinquent for five years and sold to the state for any one of those years, whereupon title was to become absolute in the state and the lands were to be deeded to the state by the Auditor-General after examination and determination by him and the director of conservation (Sec. 127). All taxes charged against such lands in the office of the Auditor-General at the time they were deeded by him to the state were expressly cancelled and such lands were directed to be removed from the assessment rolls (Sec. 130), and were thereafter to be subject to disposition as state tax homestead lands by the director of conservation either to homesteaders at ten cents an acre or to purchasers at not less than the appraised value, as provided in Sec. 131.

B. Nature of Title Acquired by State of Michigan.

The title thus acquired by the state cut off all prior title and even a former owner thereafter acquiring the lands from the state obtained a new title not related to his old one.

Grand Rapids Trust Company v. Doctor, 222 Mich. 248.

In that case it was held that one who had been in adverse possession of land for more than the statutory period of 15 years did not acquire title, for the reason that the state had held title for part of the period, although the former owner had reacquired the title from the state; the court in considering the nature of the former owner's title reacquired from the state, said at page 253:

> "Under these proceedings the former owner becomes a stranger to the title to the lands so forfeited and deeded to the State. The State takes absolute title to the same in consideration of the taxes he owed, and relieves him from any obligation to pay further taxes thereon."

To the same effect is *Krench v. State of Michigan*, 277 Mich. 168, in which it is stated at page 179:

> "The State held title in fee simple. The original title had come to an end and a new chain of title originated with the State."

In *Rathbun v. State of Michigan*, 284 Mich. 521, at 539, the court said:

> "By the foregoing provisions there can be no doubt that after the period of redemption of the

> property bid off to the State for delinquent taxes, the state receives the absolute title to such lands."

Being the absolute owner, the state has the power to dispose of lands in any way not prohibited by its constitution.

Baker v. State Land Office Board, 294 Mich. 587; *supra*,

in which the court said at page 602:

> "Former owners are granted certain rights as bidders and purchasers, but the sale is of land, title to which is vested in the State; and inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution."

In holding that the legislature of the state of Michigan had the power to determine in what manner lands owned by the state shall be sold the Supreme Court of Michigan was not giving effect to new legislation or case law subsequent to the issuance of Appellant's bonds but was recognizing that such had been the well settled law of Michigan long before 1928. Whether the legislature has imposed conditions prohibited by the state constitution is, of course, a question of state law which has been conclusively decided against the contentions of Appellant, both in the *Baker* case and in the present case in which Mr. Justice Chandler said (R. 25):

> "The Legislative body of the State has determined in what manner lands owned by the State shall be sold. In a long and able opinion to which reference has been made the constitutionality of this legislation was upheld, and having determined

that the right to make any further special deficiency assessments as well as actual assessments made are totally and completely extinguished and cancelled, it follows that petitioner's demand for a writ of mandamus should be and is denied."

It having been the law of Michigan prior to the issuance of Appellant's bonds that the state could dispose of its absolute property upon any conditions that it might determine within constitutional limits and the present legislation having been upheld as being within those limits, it is difficult to see how the Appellant can claim the protection of any provisions of the federal constitution. The legislature in enacting the present statutes was merely exercising a power which it had at the time the bonds were issued. The exercise of this power certainly cannot impair the contract of the bondholders because the law existing at that time is read into the bonds as part of their obligation.

C. Analysis of the Changes Made by the 1937 and 1939 Legislation Claimed to be Unconstitutional.

We shall examine the statutes which Appellant claims to be unconstitutional to determine if the obligation of Appellant's bonds is impaired thereby. We shall consider this legislation under two headings (1) the amendments to the General Property Tax Law contained in Public Acts Nos. 114 and 325 of 1937 and Act No. 282 Public Acts of 1939, and (2) the so-called Scavenger Act, being Act No. 155 Public Acts of 1937 as amended by Acts Nos. 29, 244 and 329 Public Acts of 1939.

1: *Amendments to General Property Tax Law.*

In the Specification of Errors contained in the brief of Appellant (Appellant's brief, p. 11) the following portion of the amendments to the General Property Tax Law is designated as being the part of the statute claimed to be unconstitutional:

> "(a) those portions of Act No. 114, Pub. Acts, 1937, and Act No. 282, Pub. Acts, 1939, which amended Section 67 of Act No. 206, Pub. Acts, 1893, by adding the following language to the court decree ordering a tax sale, to-wit:
>
> 'It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and encumbrances, of whatever kind or nature, cancelled as of such date, unless any said parcel of land shall be redeemed as provided in act number 206 of the public acts of 1893, as amended, or unless an appeal shall have been taken as provided in act number 206 of the public acts of 1893, as amended, or unless any said parcel of land shall be redeemed by any political subdivision of the state as provided in act number 206 of the public acts of 1893, as amended, for redemption by any person.' (Comp. Laws, Supp. 1940, Section 3459)."

The language above quoted is from Act No. 282 of the Public Acts of 1939 which was passed subsequent to the time that the lots involved in the present litigation were

sold at the county treasurer's sale which began in May of 1938. The decree of the Circuit Court in Chancery, ordering the sale at which the lots in the special assessment district with which we are concerned, was made under the amendment contained in Act No. 114 of the Public Acts of 1937. The changes made by the 1939 amendment do not appear to be material to the present issues, but in order that the exact language of the form of the decree in effect at the time of the 1938 tax sale may be before the Court we set forth the relevant part of Section 67 of the General Property Tax Law as amended by Act No. 114 of the Public Acts of 1937. This section containing the form of the decree is as follows (We have indicated the language added to the section by printing the additions in capital letters):

"Sec. 67. Such final decree shall be entered in the chancery record for recording decrees of such court, have the usual caption for decrees, and shall be substantially in the following form:

" 'STATE OF MICHIGAN,
The Circuit Court for the } In Chancery.
County of .....

At a session of said court held at the court house in the ..... of ..... on the ..... day of ....., A. D. 19.....

Present: Hon. .....Circuit Judge.

In the matter of the petition of ....., auditor general of the state of Michigan, for and in behalf of said state, for the sale of certain lands for taxes assessed thereon:

The said petition and the matters therein stated, and the objections filed to certain taxes therein claimed (if

any such objections are filed) came on to be heard, and proof of the due publication of the order of hearing, and of said petition having been made and filed, and after hearing all parties interested therein: It is ordered, adjudged and decreed that the amount of taxes, interest, collection fee, and charges set down in the column headed "Amount decreed against lands," in the tax record of which said petition forms a part, are valid, and decree is made in favor of the state of Michigan therefor against each parcel of said land for the amount set down in said column opposite to such parcel. It is further ordered, adjudged and decreed that said several parcels of land, or such interest therein as may be necessary to satisfy the amount herein decreed against the same, shall be severally sold as the law directs, on the ..... day of May, A.D. 19...., beginning at ten o'clock a.m. on said day, or on the day or days subsequent thereto as may be necessary to complete the sale of said lands and of each and every parcel thereof, at the office of the county treasurer, or at such convenient place as shall be selected by him at the county seat of the county of ....., state of Michigan. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT TITLE TO EACH PARCEL OF LAND ORDERED IN THIS DECREE TO BE OFFERED FOR SALE, AND WHICH PARCEL OF LAND IS BID IN AT SUCH SALE TO THE STATE, SHALL BECOME ABSOLUTE IN THE STATE OF MICHIGAN ON THE EXPIRATION OF THE PERIOD OF REDEMPTION FROM SUCH SALE, AND ALL TAXES AND OTHER LIENS AND ENCUMBRANCES, OF WHATEVER KIND OR NATURE, EXCEPT UNPAID TAX OR ASSESSMENT LIENS OR CITY BIDS OF ANY MUNICIPALITY COLLECTING ITS OWN DELINQUENT TAXES AND ASSESSMENTS UPON LANDS FOR WHICH APPLICATION SHALL HAVE BEEN MADE TO THE STATE LAND OFFICE BOARD OR THE DIRECTOR OF CONSERVATION AS THE CASE MAY BE FOR THE WITHHOLDING OF SUCH LANDS

FROM SALE, CANCELLED AS OF SUCH DATE, UNLESS ANY SAID PARCEL OF LAND SHALL BE REDEEMED AS PROVIDED IN ACT NUMBER TWO HUNDRED SIX OF THE PUBLIC ACTS OF EIGHTEEN HUNDRED NINETY-THREE, AS AMENDED, OR UNLESS A SUIT TO QUIET TITLE SHALL HAVE BEEN FILED AND IS PENDING BEFORE SAID DATE, OR UNLESS AN APPEAL SHALL HAVE BEEN TAKEN AS PROVIDED IN ACT NUMBER TWO HUNDRED SIX OF THE PUBLIC ACTS OF EIGHTEEN HUNDRED NINETY-THREE, AS AMENDED, OR UNLESS ANY SAID PARCEL OF LAND SHALL BE REDEEMED BY ANY POLITICAL SUBDIVISION OF THE STATE AS PROVIDED IN ACT NUMBER TWO HUNDRED SIX OF THE PUBLIC ACTS OF EIGHTEEN HUNDRED NINETY-THREE, AS AMENDED, FOR REDEMPTION BY ANY PERSON. It is further adjudged and decreed that the several special orders made by this court, and entered on said tax record, are made a part hereof, with the same effect as if entered herein.

.....

Circuit Judge.

(Countersigned)

....., Clerk of Courts.'

"UPON THE ENTERING OF THE DECREE HEREINBEFORE PROVIDED FOR, ABSOLUTE TITLE TO THE LANDS THEREIN SHALL VEST IN THE STATE OF MICHIGAN AS PROVIDED IN SAID DECREE."

With the exception of the portions added by the 1937 amendment that part of Section 67 of the General Property Tax Law which we have just quoted remained the same as it had been at the time Appellant's bonds were issued in 1928, the last previous amendment to the section having been made by Act No. 262 of the Public Acts of 1899.

The effect of the 1937 amendment to Section 67 was to vest absolute title in the state of Michigan at the expiration of the period of redemption provided in Section 74 of the General Property Tax Law (1 Compiled Laws 1929, Sec. 3467) as amended by Act No. 325 of the Public Acts of 1937. Prior to the 1937 amendment the language of this section stating the period of redemption read as follows:

> "Sec. 74. Any person owning any of the lands sold as aforesaid, or any interest therein, may, at any time before the first (1st) Tuesday in May in the year following such sale, redeem any parcel of such lands, or any part or interest in such lands, by showing to the satisfaction of the county treasurer or Auditor General that he owns only that part or interest in the same which he proposes to redeem, by paying to the county treasurer or Auditor General the amount of the sale of the parcel of land, or the portion thereof wished to be redeemed, and interest thereon from the date of such sale."

By Act No. 325 of the Public Acts of 1937 the foregoing language was amended to read as follows (Changes are indicated by capital letters):

> "Sec. 74. Any person owning any of the lands sold as aforesaid, or any interest therein, may, at any time WITHIN EIGHTEEN MONTHS following such sale, redeem any parcel of such lands, or any part or interest in such lands, by showing to the satisfaction of the county treasurer or auditor general that SUCH PERSON, CITY OR POLITICAL SUBDIVISION owns only that part or interest in the same which SUCH PERSON, CITY OR POLITICAL SUBDIVISION proposes to redeem, by paying to the county treasurer or auditor general the amount of the sale of the parcel of land, or the portion thereof wished to be redeemed, and

interest thereon from the date of such sale, AT ONE PER CENT PER MONTH OR FRACTION THEREOF."

The effects of the 1937 amendments to Sections 67 and 74 were:

(1) The amendment to Section 67 vests absolute title in the state at the end of the redemption period provided in Section 74 as amended. At the time Appellant's bonds were issued the county treasurer's sale pursuant to the form of decree provided in Section 67 did not vest absolute title in the state of Michigan at the expiration of the redemption period but absolute title vested in the state of Michigan only after the land had been delinquent for taxes for any five years and had been sold and bid off to the state for the taxes of one or more of those years (Section 127 of General Property Tax Law, 1 Compiled Laws 1929, Sec. 3520). The result of the amendment was that commencing with the 1938 annual tax sale all property bid off to the state and not redeemed would become vested in the state at the end of 18 months instead of five years.

Appellant apparently does not claim that this shortening of the time is unconstitutional. It could not, however, object because the lots in question had been delinquent for more than five years at the time title became vested in the state on November 3, 1939, so that Appellant was not prejudiced by this change (R. 3, 5, 6, 12).

(2) The amendment to Section 67 expressly provides that title to each parcel of land which is bid in at such sale to the state becomes absolute in the state of Michigan at the expiration of the 18-months' period of redemption and

"all taxes and other liens and incumbrances of whatever kind or nature * * * cancelled as of such date."

The language added by the amendment was necessary (1) to make clear that absolute title vested in the state at the expiration of the redemption period instead of after five years, as formerly, and (2) to negative any possible interpretation that the county treasurer's sale to the state was subject to subsequent taxes and assessments after the expiration of the redemption period and during the remainder of the five year period, as formerly. But when absolute title became vested in the state the effect upon taxes and assessments was no different than before the amendment.

This is the amendment which, as construed by the Supreme Court of Michigan in the present case, Appellant claims impairs the obligation of its contracts by cancelling the right to reassess for deficiencies. Appellant's contention appears to be based entirely upon the decision of the Supreme Court of Michigan in *Case v. City of Saginaw*, 196 Mich. 687. We shall now examine the decision in that case to find out if it gives any support to Appellant's position.

Case v. City of Saginaw, supra, decided by the Supreme Court of Michigan on June 1, 1917, was an appeal from a decree dismissing a bill of complaint brought to enjoin the spreading of an assessment against plaintiff's land on the 1916 city tax roll. The premises in question were bid off to the state of Michigan for delinquent taxes for the years 1905 to 1910, inclusive, and on January 28, 1914, were deeded to the state by the Auditor-General and on August 18, 1914, the commissioner of the state land office

conveyed the premises to the plaintiff who brought the suit to enjoin the assessment. During the year 1911 the city of Saginaw had constructed a sewer and had levied an assessment against the property which became a lien on March 26, 1912. The assessment was divided into ten equal parts extending over a period of ten years. The land had also been assessed for a sidewalk which became a lien on November 15, 1913, and was divided into five instalments payable over a period of five years.

At the time of the transfer of the property to the state there had been returned delinquent state, county and city taxes and the 1912 instalment of the special sewer tax. The plaintiff paid the state $500.00 for the property which was divided between the state, county and city in proportion to the taxes which had been returned delinquent. It is important to note the following fact:

> "In arriving at the amount to be paid to the city, no consideration was given to installments for special taxes which were spread in 1913 and 1914, nor to those which would, under ordinary conditions, have been spread in future years to complete the payment of the improvements, making a total of $704.07" (196 Mich. 687, at 688).

In other words, in determining the share of the proceeds to be allocated to the assessment district no consideration had been given to future installments of assessments but only to the installments which had been returned delinquent when title was acquired by the state. This is an important distinction from the present case because under Section 10 of the Scavenger Act (Act No. 155 of Public Acts of 1937 as amended by Act No. 244 of Public Acts of 1939) under which the lots in the present case were sold, the proceeds will be divided in proportion to the delin-

quent taxes and special assessments cancelled and since the Supreme Court of Michigan has held that the assessment is cancelled in its entirety this would mean that the special assessment district will receive such portion of the entire proceeds as the whole assessment bears to the total amount of taxes and assessments cancelled, whereas in the situation involved in *Case v. City of Saginaw, supra,* the special assessment district only received that proportion of the proceeds which the amount of the 1912 installment of the sewer tax bore to all the taxes cancelled. Here the bondholders will receive their full proportion of the proceeds of the sale based upon the entire amount of the assessment.

In *Case v. City of Saginaw, supra,* plaintiff contended that the lien of the assessments was cancelled upon the transfer to the state, relying chiefly upon Sections 127, 130 and 131 of the General Property Tax Law. The opinion of the circuit court holding that the land could be assessed for the remaining installments of the assessment was affirmed by an equally divided court. Of the eight justices, three of them adopted the opinion of the circuit judge to the effect that only the installment returned delinquent to the Auditor-General was cancelled and the fourth affirming justice held that the lands were not liable for special assessments falling due while they were held and owned by the state but were liable for such installments as became due after the property again became subject to private ownership.

The other four justices in an opinion by Mr. Justice Ostrander held that the entire assessment was cancelled. No question of reassessment was involved but there is no reason to believe that these four justices would not also have held that any right to reassess was also cancelled. The following is Mr. Justice Ostrander's opinion in full:

> "It is, I think, illogical to say that, when the State acquires title to lands in tax proceedings, a lien for a special tax, existing when title is so acquired, remains, to be enforced whenever the State secures a purchaser for the land. After lands are deeded to the State, the supervisor is directed by the law to omit them from his roll. While they belong to the State, they are liable to no assessment, for any purpose. If any tax is charged against them in the office of the auditor general, it must be canceled. The State, then, has all the title there is, and when it sells and conveys the land, the purchaser acquires, *prima facie*, a fee. The law does not, in my opinion, contemplate a continuing lien for special taxes after the State has acquired its title" (p. 694).

Counsel for Appellant has not submitted any other authority either in the Michigan statutes or in the decisions of the Michigan Supreme Court which would justify their contentions that Appellant has a vested contract right not to have the special assessments cancelled by the acquisition of the title by the state of Michigan and a subsequent conveyance to a private owner.

An examination of Shepherd's Michigan Citations reveals that *Case v. City of Saginaw, supra,* has been cited by the Michigan Supreme Court in only one case, namely, *Auditor General v. MacKinnon Boiler and Machine Company,* 199 Mich. 489, in which the case was cited in the dissenting opinion of Justice Fellows at page 494 where he quoted the language of his own concurring opinion.

We respectfully submit that *Case v. City of Saginaw, supra,* should not be made the basis for declaring unconstitutional the important 1937 amendments to the General Property Tax Law, particularly since Section 10 of the

Scavenger Act gives Appellant its full share of the proceeds of sale. (See discussion, *supra*, p. 32, and *infra*, pp. 39-40.) The dissenting opinion of Mr. Justice Ostrander which we have quoted above is certainly more in line with the present view of the Supreme Court of Michigan as expressed in *Baker v. State Land Office Board*, *supra*, and in the present case. An opinion of a circuit judge repudiated by four of the eight justices of the supreme court is not sufficient justification for invalidating important legislation passed to meet pressing present needs.

It is, therefore, our position that the language added to the form of the decree by the 1937 amendment to Section 67 of the General Property Tax Law did not change the law but merely gave expression to existing law as to the effect of the acquisition of title by the state of Michigan.

2: *The Effect of the So-called Scavenger Act.*

The other legislation claimed to be unconstitutional is Act No. 155 of the Public Acts of 1937 as amended by Acts Nos. 29, 244 and 329 of the Public Acts of 1939, particularly Sections 9 and 10 thereof, the parts of which claimed by Appellant to be unconstitutional being quoted in Appellant's Specification of Errors as follows (Brief of Appellant, p. 12):

> "Sec. 9. * * * Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any encumbrances, except as herein otherwise provided. * * * "

"Sec. 10. All moneys received by the state land office board, * * * shall be credited to the general fund of the state, and shall be paid to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the state of Michigan."

The Act as amended is found in most convenient form in Mason's 1940 Supplement to the Compiled Laws of Michigan of 1929, Secs. 3723-1 through Sec. 3723-14.

The Scavenger Act changed the method of disposing of lands to which the absolute title had vested in the state of Michigan pursuant to tax sales. The State Land Office Board was set up to administer the act in the southern counties of the state, including Oakland County in which is located the special assessment district involved in this case.

Section 7 provides for the so-called "Scavenger Sale" to be held each year commencing on the second Tuesday of February after the vesting of title in the state of Michigan. At this sale all such lands (except such as may be withheld at the request of municipalities) are offered for sale at public auction. No bid can be accepted for less than 25% of the assessed valuation as fixed for the year preceding the vesting of title in the state. Outsiders who are successful bidders must pay the entire purchase price

in cash within 24 hours, whereas persons who had an interest in the property at the time of the county treasurer's tax sale can buy on contract with 10% down payment with the balance payable over a ten-year period; such former owners can also meet any outside bid within 30 days after the sale in which case the outsider is refunded his money and the former owner can buy on land contract as if he had been the successful bidder at the sale.

These provisions granting special privileges to former owners were upheld by the Supreme Court of Michigan in *Baker v. State Land Office Board*, 294 Mich. 587, *supra*, on the grounds thus stated (p. 602):

> "Former owners are granted certain rights as bidders and purchasers, but the sale is of land, title to which is vested in the State; and inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution."

We have already pointed out in this brief (*supra*, pp. 23-24) that this power of the state to dispose of its absolute property on any terms which the legislature might fix was not something new, but was a power existing when Appellant's bonds were issued. Appellant, therefore, cannot rely upon the method of disposition provided in the tax laws prior to 1937 because its bonds were subject to the power of the legislature to change this method at any time.

Section 9 of the Act provides in part as follows:

> "Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the

board under the provisions of this act, free from any encumbrances, except as herein otherwise provided" (The exception is not relevant here).

It is this quoted sentence of Section 9 which Appellant claims to be repugnant to the constitution of the United States (Appellant's brief, p. 12). To sustain this contention Appellant must establish:

(1) That the law existing at the time its bonds were issued gave a different effect to a deed from the state. The only authority apparently relied upon to establish this is *Case v. City of Saginaw, supra,* (which we have already distinguished, *supra,* pp. 31-35) construing Section 130 of the General Property Tax Law, which is still a part of the general tax law without any change whatever (1 Compiled Laws 1929, Sec. 3526). The fact that Section 130 has not been amended or repealed indicates clearly that it is not considered by the legislature to be inconsistent with Section 9 of the Scavenger Act which has been construed by the Supreme Court of Michigan in this case to pass title to a purchaser from the state free from any right to reassess the property for past improvements.

(2) Even if Appellant were able to establish that the law prior to 1937 was different, it would also have to establish that the change made by Section 9 of the Scavenger Act impaired the obligation of its contract rights. This Appellant has also failed to do. The quoted language of Section 9 merely states one of the conditions upon which the land is sold by the state, namely, that it is free from all encumbrances, including the right to reassess for past improvements. Since the state has always had the

power to sell its absolute property on any terms it might choose (see discussion above, pp. 23-24) the exercise of this power which existed long before 1928 cannot impair the obligation of Appellant's bonds.

Section 10 of the Scavenger Act, particularly that part quoted above (*supra*, p. 36), is also claimed to be in violation of the Constitution of the United States. This section provides for the distribution of the proceeds of the scavenger sale. The proceeds of any parcel sold are to be paid to the several taxing units

> "in proportion to the delinquent taxes and special assessments cancelled. * * * Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the state of Michigan."

The effect of Section 10 is that the special assessment district will receive such proportion of the proceeds as the *total* assessment bears to the total of all taxes and assessments cancelled.

In *Case v. City of Saginaw* (*supra*, p. 32) the district had received only that proportion which the one installment sold bore to the total of all taxes and assessments cancelled. There was room for argument there that the district should not be barred from assessing for future installments because those installments had not been taken into consideration in dividing up the proceeds of sale. But in the present situation *the assessment district will receive its full share of the proceeds of a public sale.*

It is clear, then, that Section 10, instead of being unconstitutional, in reality assures to Appellant that it will receive its fair share of the proceeds of the public sale. Even if the amendments to the General Property Tax Law and the other sections of the Scavenger Act had materially changed the law existing at the time Appellant's bonds were issued, Section 10 leaves the bondholders with a constitutionally sufficient remedy, namely: The property is sold at public auction and fairly divided between the taxing units, including the assessment district to the full extent of the assessment.

It is pure speculation to say, as Appellant does in its brief, p. 32, that because of the particular advantages given to former owners at the sale "that what the statute called an auction sale was in fact nothing of the kind because the incentive for competition was removed". This Court will certainly not set aside the statute merely because of what the colored preacher called a "floating possibility" that someone may have been deterred from bidding at the sale. The presumption of validity which upholds the constitutionality of all state legislation until the contrary is shown cannot be rebutted by nebulous conjecture.

Particularly is this true here because, under the law in effect when Appellant's bonds were issued (1 Compiled Laws 1929, Sec. 3527), the state was not required to hold a public sale but was required to sell to homesteaders at only ten cents an acre, so that the bondholders had no contract or constitutional right to have the land sold for a higher price.

3: *Appellant Had Notice of the Changes in the Statutes in Ample Time to Protect Itself by Bidding at the Sales.*

The changes in the General Property Tax Law and the enactment of the Scavenger Act took place many months before the 1938 tax sale which began in May of 1938. Appellant and the other bondholders, had they desired to protect their security, could have bid at the 1938 tax sale and thereby prevented the title from vesting in the state of Michigan 18 months later. The people of the state of Michigan have always had the right to enforce a first or preferred claim upon lands delinquent for taxes, and bondholders should have known that unless they protected themselves by bidding at the tax sale their rights would be cut off by the exercise of the paramount rights of the state (Sec. 60 General Property Tax Law, 1 Compiled Laws 1929, Sec. 3451).

See *Ingraham et al. v. Hanson*, 297 U. S. 378, for an analagous situation in which it was held that a change in the tax law did not impair the obligation of the contract of bondholders.

Appellant and the other bondholders could also have bid at the 1940 scavenger sale but they did not choose to do so. Although former owners could have met their bid the bondholders could, nevertheless, have forced the price up so that the full value would have been obtained.

Either the land in question was worth the amount of the delinquent taxes and assessments or it was not. If the

land was worth more the Appellant had ample opportunity to prevent its acquisition by the state by purchasing at the tax sale, or Appellant could have bought at the scavenger sale or forced the price up. If the land was worth less than the outstanding taxes and assessments there was obviously no point in Appellant or the other bondholders bidding at the tax sale, and a reassessment also would be useless because the excessive amount would again not be paid. It is also equally obvious that as long as the land is worth less than the assessment title will remain in the state if the state cannot sell the property free from the excessive assessment. In either alternative Appellant is not entitled to complain of changes made by the 1937 and 1939 statutes.

POINT III.

THE MICHIGAN STATUTES SHOULD NOT BE DECLARED UNCONSTITUTIONAL AS APPLIED TO APPELLANT BECAUSE IT IS DOUBTFUL WHETHER THE STATE OF MICHIGAN CAN DISPOSE OF THE LOTS IF THE PURCHASER MUST TAKE THEM SUBJECT TO THE RIGHT TO REASSESS

The Attorney General of Michigan submits the following argument under this point:

We have pointed out in the Statement of the Case, (*supra*, pp. 3-4) that the successful bidder at the scavenger sale had not executed the contract but was awaiting the outcome of this litigation. The successful bidder takes the position, and so informed the State Land Office Board, that it will not execute the land contract but will relinquish its rights under its bid in the event that the city of

Birmingham is given the right to reassess the paving tax upon the lots in question, (R. 16). The Attorney-General has also been informed that the members of the State Land Office Board apprehend that if the successful bidder did release its rights the other purchasers of lots will also rescind their agreements and title to those properties will also again become vested in the state of Michigan (R. 16).

While held by the state the lands would not be subject to special assessment even if not used for governmental purposes.

People Ex. Rel. Auditor General v. Ingalls, 238 Mich. 423.

Under the circumstances which exist it is hard to see how any benefit will be conferred upon Appellant if this Court should hold that Appellant can compel a reassessment in the hands of purchasers from the state. The decision will simply mean that the properties will remain state owned, not subject to reassessment, and Appellant will be no better off than it was before this suit was brought. The decision of the Supreme Court of Michigan below, even if erroneous as a matter of theoretical constitutional law, would not, therefore, deprive Appellant of any substantial rights.

This Court should be extremely reluctant to declare invalid important state legislation when the result would be only the justification of theoretical rights without any practical benefit to the Appellant.

The Appellees other than the state of Michigan do not join with the Attorney General in urging that this case be

disposed of on the grounds stated under Point III. Such a disposition would leave undecided the really important question as to whether the state had the constitutional power to cancel the right to reassess. As long as this question is undecided no one will be willing to purchase from the state of Michigan lands possibly subject to reassessment for past improvements and such properties will remain off the tax rolls without contributing anything to the expenses of local government. The state of Michigan is not concerned with this because since 1935 there has been no state property tax, the state's revenues having since then been raised by sales and other excise taxes. But the city of Birmingham and many other municipalities are vitally concerned that the constitutionality of the 1937 and 1939 statutes be upheld. If this Court does not now lay all doubts at rest there is sure to be subsequent litigation which will reach this Court as the only tribunal with power to decide the question conclusively.

POINT IV.

APPELLANT'S RIGHT TO REASSESSMENT IS NOT CLEAR IN ANY EVENT UNDER THE WORDING OF THE VILLAGE AND CITY CHARTERS

This Court will inquire for itself into the existence of Appellant's alleged contract rights and the nature and extent of their obligation. The most recent statement of this rule is that given in *Irving Trust Company v. Day*, No. 51 Oct. Term, 1941, decided January 5, 1942, in which it was said:

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract

and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court" (86 Law. Ed. 352).

In the briefs filed with the Supreme Court of Michigan on behalf of the Appellees and by the Attorney General, intervening on behalf of the state of Michigan, arguments were presented that under a proper construction of the village and city charters the alleged right of reassessment claimed by Appellant did not exist. These arguments were not passed upon by the Supreme Court of Michigan.

The village charter provided "should any special assessment prove insufficient to pay for the improvement or work for which it is levied, and the expenses incidental thereto, the Commission may make an additional pro rata assessment to supply the deficiency" (R. 6).

Fairly interpreted this provision applies only when the amount of such special assessment proves insufficient to pay the actual cost of the improvement, or, in other words, an additional assessment may be levied only when the actual costs, including incidental expenses, exceed the estimate.

Appellant contends that an additional assessment may also be made to cover deficiencies in collections. The charter does not so provide and should not be extended by implication.

If the charter is construed as requiring a reassessment for deficiencies in collection it would not apply to a defi-

ciency arising out of the peculiar circumstances here existing. This deficiency does not arise from failure of collection in the ordinary sense, but arises only because the state in the exercise of its sovereign power has destroyed or satisfied the assessment liens. Neither the special assessment nor the collections proved insufficient; the state having acquired the land through the regular tax sale, has sold it free from special assessment liens. If Appellant is entitled to a reassessment the charter must be interpreted broadly enough to cover a deficiency whether such deficiency results by reason of any insufficiency in the original assessment or in the collection thereof through the processes provided in the charter, or through the action of the state itself in destroying or satisfying the assessment liens which were the only sources provided for the collection of the assessment. Moreover, the deficiency in this case is not the usual one where certain lots default leaving the district as a substantial unit upon which a reassessment can be levied. Here practically the whole district has failed to make any payment whatever so that substantially the whole amount of the original assessment would be reassessed on the same property. As it already appears by this general default that the land is not worth the assessment, a reassessment of the same amount on the same property would be an idle ceremony. The contingency here existing is not within the purpose intended to be covered by the charter. The provisions for the assessment should be limited to the cases where the special assessment proved insufficient either because the amount originally assessed was insufficient or because the original assessment failed of collection, always assuming that the liens for assessment continued and the remedies for their enforcement likewise continued.

The city charter provides for reassessment only "where any such assessment shall prove to be invalid in whole or in part" or "whenever for any cause, mistake or inadvertence the amount assessed shall not be sufficient" (R. 6, 7).

In the case of *State v. Vancouver*, 160 Wash. 655, under a similar charter provision the court held that the bondholders were entitled to a reassessment only when the deficiency arose from the causes therein enumerated or causes of like nature.

We agree that Appellant is entitled to all the rights and remedies given either by the village or by the city charter but it has no rights which cannot be found in either charter.

Appellant conceded that the original assessments which became due before the tax sale of 1938 are cancelled, but claims the right of reassessment as an independent right arising after the property has returned from the state to private ownership. We submit that the right of reassessment, if it is an independent right, came into existence immediately when the bonds became due and it was ascertained that the special assessment fund was then insufficient for their payment. If Appellant is now entitled to a reassessment it was equally so entitled at that time, or at any rate, not later than the sale for taxes in 1938 and if the reassessment had been made it would have been cancelled when title passed to the state. Appellant has therefore lost no rights in being now denied a reassessment which would have been cancelled if it had been made at the proper time.

CONCLUSION

For the reasons which we have given we respectfully request that the judgment of the Supreme Court of Michigan denying the Appellant its writ of mandamus to compel the reassessment against the lots in question be affirmed.

Respectfully submitted,

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Dated February 28, 1942.